No. 66.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,
v.
ARABELLA D. SILENOTT, et al.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

WM. HENRY DENNIS,
Attorney for said Executrix.

Washington, D. C.
Gibson Bros., Printers and Bookbinders.
1900.

8366

Supreme Court of the United States.

OCTOBER TERM, 1900.

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Brief for the Executrix, Plaintiff in Error and Appellant.

I. STATEMENT OF THE CASE.

This case results from sundry proceedings directed against the widow and executrix of Alexander M. Kenaday, deceased, by his next of kin, in what is practically the orphans' court of the District of Columbia, now known as the special term of the Supreme Court of said District for orphans' court business.

Alexander M. Kenaday, a prominent veteran of the

Mexican war, and a claim agent (but not a lawyer), died in Washington on or about March 25, 1897, leaving a widow, Mary Louise Kenaday, and no children or descendants.

He left a last will and testament (1) somewhat inartificially drawn, and showing individual peculiarities of expression, the plain intention of which was to dispose of *all* his property, by giving substantial legacies to his next of kin, and to give his other property to his "beloved wife," whom he appointed sole executrix.

She promptly paid the legacies to the next of kin (5) except in the case of one who had died, and another, of whom it is still uncertain whether he is alive or dead (5).

In June, 1898, she published the usual "final notice" preparatory to closing the estate (4) which was responded to by a claim from the present defendants in error or appellees, in the form of a petition to the court (5) for the distribution to them of certain assets alleged to be "not disposed of by the will."

The executrix filed her final account, showing a distribution of these assets to herself as legatee (7–8); the appellees excepted on that and other grounds (9); the executrix answered the exceptions (11), and her account was approved by Mr. Justice Hagner, an able jurist of long experience in the existing testamentary law of Maryland and the District of Columbia.

The appellees in the case at bar then appealed to the Court of Appeals of the District of Columbia (13) which sustained the executrix and the orphans' court as to all the exceptions save one (with a severe censure of the spirit displayed in some of them), but held that some part of the personal estate was not disposed of by the will, and could be distributed by the orphans' court to the next of kin. Its opinion is reported in 27 Wash. Law Reporter,

82, and 14 D. C. Appeals, 1 (*Sinnott* v. *Kenaday*), and is annexed to this brief.

The case was necessarily remanded to the court of first instance to state a new account in accordance with the opinion and mandate (13), was referred to the register of wills for that purpose (15), affidavits as to the facts were filed by the next of kin (15–16), and the register stated an account (17) to which the executrix objected and excepted (18), but which was passed by the justice then holding the orphans' court.

This account narrowed the issue to the question of the distribution of a balance of $8,285.64 (18), claimed on one side by the widow, and on the other by the next of kin, and some errors of accounting (19).

The executrix then appealed (20) to the Court of Appeals for the purpose of bringing the matter to this court, and that court, in a summary way, approved the account stated by the register of wills as being "stated in accordance with the mandate" (25).

Some doubt being then raised whether an appeal or a writ of error would be the proper method of carrying the case to this court, the Court of Appeals allowed both (28). This was made the basis of a motion here to dismiss the case, at the last term, which was laid over by the court to be heard at this time.

II. Specification of Errors.

The executrix respectfully submits that the Court of Appeals of the District of Columbia erred—

1. In holding that the justice of the Supreme Court of the District of Columbia, holding the special term for orphans' court business, has jurisdiction to order and compel a distribution by an executrix to the next of kin

of the testator, of a sum in the hands of the executrix alleged to be not bequeathed to any one by the will, and in overruling the contention of the executrix that such a question is exclusively within the cognizance of equity or chancery.

2. In deciding that the justice holding said special term had jurisdiction to construe the will of said testator for the purpose of arriving at the conclusion mentioned.

3. In holding that the judicial construction of the will of said testator should be that he failed to bequeath the beneficial interest of part of his personal estate, to wit, sundry United States bonds, instead of holding that said bonds passed to his widow, as "evidences of indebtedness."

4. In holding that the widow was not entitled at least to one-half of an residue of personal estate not bequeathed by testator.

5. In ignoring and thereby overruling the objections and exceptions of the executrix to the account stated by the register of wills, dated February 10, 1899.

6. In affirming the order of the orphans' court, dated February 10, 1899, approving the account termed the final account of this estate.

III. Argument.

The first question which arises and one which will be of importance in other cases of the same nature as this, is the question of

Jurisdiction.

To this point the Court of Appeals directs a large part of its opinion, and incidentally thereto not only sets aside the English doctrine as to the respective jurisdictions of

probate and chancery, but also, as it appears to counsel for the executrix, virtually attempts to repeal an established part of the common law, as inherited by us from England, a task which can properly be accomplished only by a statute for that purpose. This is the doctrine that a balance of personal property not disposed of by the will must remain vested in the executor beneficially unless a *court of chancery* sees reason in the will for decreeing him to be a trustee for the next of kin.

The only authority cited by the Court of Appeals for its rather surprising utterance on this subject is a passage from 2 Story's Eq. Jur., sec. 1208, where he says that "in America the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator."

But it is apparent from the cases cited by Justice Story that in saying "by law," he means "by *statute* law," as in his own State of Massachusetts, where an act for the purpose was passed in 1783; otherwise the doctrine of the common law would prevail there.

Hays *v.* Jackson, 6 Mass. 149.

Mr. Schouler in his work on Executors, sec. 494, expresses the idea more fully and with less danger of misinterpretation, when he says that *American statutes* one hundred years old "repudiate the notion that a beneficial interest vests in the executor."

The Court of Appeals, however, in its opinion on the former appeal, says (1 App. Cas. D. C. 21):

> "The principle that obtained in the English law prior to the passage of the statute first referred to (11 Geo. IV and 1 Wm. IV) never had force or recognition in the jurisprudence of Maryland."

This appears to mean only that no reported case can be found in which the principle of the right of an executor to a residue is decided in Maryland. But it is submitted that this is a most dangerous and undesirable test to apply at this late day to a doctrine of the common law in any State, especially by a court in another jurisdiction. Because a principle is so well established that no one has ever seriously contested it and obtained a reported adjudication from the highest court, would seem to be a reason for considering it in force, not the contrary. Otherwise the courts might repudiate at this late day a number of the subordinate doctrines, at least, of the English common law, on which counsel have advised and parties have acted in confidence since early times. Maryland is one of the less populous States, and litigation there and the resulting reported cases are not so plentiful as elsewhere. It might easily happen that many of the doctrines of the common law would not be found expressly affirmed in any reported case in Maryland, especially in the early judicial history of the State, when reports were meagre. Surely the courts should not be at liberty suddenly to strike down one of these doctrines, and thereby deprive the inhabitants of the District of Columbia in part of that guarantee found in the third section of the Maryland "Declaration of Rights," namely:

> "That the inhabitants of Maryland are entitled to the *common law of England*, and the trial by jury according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used, and practiced by the courts of law

> or equity; and also to all acts of assembly in force on the first of June, seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights."
>
> Comp. Laws, D. C., page 644.

Although this dictum of the Court of Appeals is made in a measure only argumentatively, and in reference to jurisdiction, not to the merits of the case, still it is of such importance, and seems to be of such a tendency to unsettle much law regarded as established, that it is submitted that it would be unfortunate if it were passed over with even tacit approval by the court of last resort, and that, on the contrary, the doctrines of the common law ought to be upheld as in force until repealed by statute, not by the courts.

But even apart from the foregoing, the executrix respectfully contends for this principle, viz:

The enforced distribution of any residue in the hands of an EXECUTOR, after payment of debts and legacies, is exclusively within the jurisdiction of equity or chancery, and the doctrine is unknown in any other court.

Pettit *v.* Smith, 1 P. Wms. 7.

Hatton *v.* Hatton, 2 Strange, 865.

2 Wms. on Exrs. 1st ed., *1270.

This fact is thus explained in 2 Williams on Executors, 1st ed., *899–899:

> "At law, it has been the rule from the earliest period, that the whole personal estate devolves on the executor; and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially. Atty. Gen. *v.* Hooker, 2 P. Wms. 340;

Southcot *v.* Watson, 3 Ark. 228; Urquhart *v.* King, 7 Ves. 228.

"In equity, *prima facie*, the rule has been the same as at law. The numerous cases upon the subject must be considered as having established the general rule that the executor, by the mere force of the appointment, should take all the undisposed of residue of the personal estate, as well beneficial as legal. (Lowndes on Legacies, 249, 250.) But this general rule has been controlled *in equity*, in all cases where a necessary implication or strong presumption has appeared, that the testator meant to give only the office of executor, and not the beneficial interest in the residue. In all such cases, the executor has been considered a *trustee* for the next of kin of the testator; or, in cases where no next of kin can be found, for the Crown. Middleton *v.* Spicer, 1 Bro. C. C. 201."

And, again, in 2 Williams on Executors, *1270, it is said:

"According to the statute of distributions the Ecclesiastical Court has authority to enforce the distribution of an *intestate's* effects; and, as the act of parliament contains no negative words, equity has, in this matter also, a concurrent jurisdiction with the ordinary.

"But *equity* has an *exclusive* cognizance of those cases in which there is an executor and the residue is undisposed of; for then the executor is a trustee for the residue; and the ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust." Pettit *v.* Smith, 1 P. Wms. 7; Hatton *v.* Hatton, 2 Stra. 865.

In Pettit *v.* Smith, 1 P. Wms. 7, and Hatton *v.* Hatton, 2 Strange, 865, already cited, writs of prohibition were granted against the spiritual court in such cases.

Moreover, in the subsequent act of 1 Wm. IV, c. 40, limiting the right of executors to retain a surplus undisposed of by will, parliament expressly recognizes the exclusive jurisdiction of chancery in such a case and directs that in the specified cases "executors shall be *deemed by courts of equity* to be trustees," etc.

2 Wms. on Exrs. *899.

This shows the doctrine of chancery as we derived it from England.

Those who framed the Maryland Act of 1798, chap. 101, which is the testamentary code of the District of Columbia, showed themselves be thoroughly conversant with the old English chancery system. Where they desired to change it they did so in express words. Thus, they knew even the point of detail that under the English practice, for technical reasons, an order of court was necessary to grant leave to take an executor's bond into another court to sue upon it, and they dispensed with that formality, as follows:

> "Any bond executed by an executor or executrix, or an administrator or administratrix, as hereafter mentioned, shall be recorded in the office of the register of wills, where administration is granted, and any person conceiving him or herself interested in the administration of the estate, *shall be entitled to, and have on demand, a copy of such bond*, and a certificate from the register, under his hand and the seal of his office, upon which copy and certificate an action may be maintained, in the name of the State for the use of the party interested, and judgment may be recovered upon such action for the damage actually sustained."
>
> Md. Act of 1798, c. 101, sub. c. 3, sec. 10.

At the same time they guarded against unauthorized

innovations by this strong declaratory clause near the end of the act:

> "The said orphans' court shall not, under pretext of incidental power or constructive authority, exercise *any jurisdiction whatever* not *expressly* given by this act or some other law.'
>
> Md. Act of 1798, c. 101, sub. c. 15, sec. 20.

And in the body of the act occurs also this reservation:

> "Nothing in this act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trust."
>
> Md. Act of 1798, c. 101, sub. c. 12, sec. 16.

So the framers of the act of 1798 must have been familiar with the well-known and long-established doctrine about the distribution of a surplus in the hands of an executor by the equity court. If they had thought best to change it, they would have done so in express words. But the orphans' court they established, composed of three laymen or justices of the peace, was not well adapted to considering complicated questions. The act therefore left the matter, as before, in the exclusive jurisdiction of the equity court, which is so much better adapted to deal with it than the orphans' court, that it seems strange that in the present case the next of kin did not resort to their undoubted right to apply to the equity court for relief, instead of raising the question of jurisdiction in the orphans' court.

If there were a transfer of the jurisdiction, it would naturally be found in our "Statute of Distribution," which is sub-chapter 11 of the Maryland Act of 1798. But that sub-chapter is closely a re-enactment of the English "Statute of Distribution," 22 and 23 Chas. II,

ch. 10, and applies only to an ADMINISTRATOR having in charge the goods of an INTESTATE.

Where a testator, as in this case, appoints an executrix, he does *not* "die intestate" as to any part of his personal property, for the legal title to all of it vests in the executrix, subject only to the obligation of paying debts and legacies.

Story, Eq. Jur., § 1208.
Hays *v.* Jackson, 6 Mass. 149.
Lowndes on Legacies, 249, 250.
Sinnott *v.* Kenaday, 1 App. Cas. D. C. 18.

The statute of 22 and 23 Chas. II, ch. 10, was in force when the decisions were made, that the courts corresponding to our orphans' court had no jurisdiction to compel an executor to distribute a balance not bequeathed. By re-enacting it, by a familiar principle of statutory construction, the decisions upon its meaning also became law.

23 Am. and Eng. Cycl. Law, 370.

Said sub-chapter 11 is headed, in Kilty's official edition, "Distribution of an *intestate's* personal estate." It provides that when "all the debts of an *intestate*" shall have been discharged or settled, etc., "the *administrator* shall proceed to make distribution of the surplus." The word "intestate" occurs a dozen times in the sub-chapter, and "administrator," several times; but the word "testator" or "executor" is never mentioned therein.

In sub-chapter 15, above cited, section 12 gives power to decide disputes "between *legatees*, or persons entitled to any distributable part of an *intestate's* estate and executors and administrators;" but the present comes under neither of those heads. The appellants allege

that there are *no* "legatees" of the surplus they claim, and, as just shown, Alexander M Kenaday was not an "intestate" as regards his personal property, for he left a testament appointing an executrix. The grant of chancery powers to orphans' courts, in the same section, is merely to "enforce obedience to and execution of their decrees," that is, an *adjective* and not a substantive grant. It certainly does not give them all of the chancery jurisdiction.

It is submitted that the merely general declaratory clauses quoted from the act of 1798 by the learned Court of Appeals are not sufficient to change well-established boundaries of jurisdiction. In relying upon them, that court is allowing the orphans' court to exercise "incidental power" or "constructive authority," and not "jurisdiction expressly given,"—in violation of the act of 1798. The very lax construction given to these clauses by that court would apparently, with equal force, allow the orphans' court to entertain a suit against an executor for a debt, or replevin by him for part of the assets of the estate, or many other suits admittedly beyond its jurisdiction.

United States *v.* Walker, 109 U. S. 258.
Keyser *v.* Breitbarth, 3 Mackey, 19.
Re Thompson's estate, 6 Mackey, 536.

It is submitted, therefore, that in its anxiety to grant relief and deal practically with this case, the learned court below has fallen into at least two grave errors on the subject of jurisdiction, which, if uncorrected, might unsettle much of the law hitherto regarded as established. Its error in regard to over-extending the jurisdiction of the orphans' court, it is submitted, is in the same direction as that specially noticed by this court in *Campbell* v. *Porter*, 162 U. S. 489, referring to *Barbour* v. *Moore*, 4 App. Cas. D. C. 535.

Moreover, probate courts have no general power to construe wills.

Fiester *v.* Shepard, 92 N. Y. 25.

Construction of the Will.

Coming to the merits of the case, it is submitted that even if it had been begun by the next of kin in proper form, that is to say, by a bill in equity, which would have settled all the doubtful questions about a missing nephew, etc., yet the next of kin could not prevail, in face of the natural, obvious, and reasonable construction of the will.

The rule of construction particularly applicable is that laid down by Jarman as No. 16, viz:

> "That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, *rather than one that will render any of the expressions inoperative;* and of two modes of construction, that is to be preferred *which will prevent a total intestacy.*"

This rule has been strongly sustained by this court in a number of important cases.

Given *v.* Hilton, 95 U. S. 594.
Patch *v.* White, 117 U. S. 210.
Lee *v.* Simpson, 134 U. S. 572.
Hardenbergh *v.* Ray, 151 U. S. 112.
Home for Incurables *v.* Noble, 172 U. S. 383.
See also Colton *v.* Colton, 127 U. S. 300.

The other rule is that a widow who has relinquished her *pars rationabilis* or thirds of the personal estate, and

accepted the provision made for her by her husband's will, has a much stronger claim to a liberal construction in her favor than the heir at law has against a devisee, or next of kin against a legatee, inasmuch as she is *a purchaser for a fair consideration.*

This is strongly and emphatically declared in Durham *v.* Rhodes, 23 Md. 233, 242, as follows:

> "A widow, to whom a general bequest is made by her husband in lieu of dower, is a purchaser of that which she takes under the will with a fair consideration. 1798, ch. 101, sub-ch. 13, sec. 5; 1 Rop. on Leg. 297; Snively *v.* Bevans, 1 Md. 223; Gibson *v.* McCormick, 10 G. & J. 113, 114; Mantz *v.* Buchanan, 1 Md. Ch. 205. In this State, every devise of land or bequest of personal estate to a widow, unless otherwise expressed in the will, shall be construed to be intended in bar of her dower in lands or share of the personal estate respectively. 1798, ch. 101, sub-ch. 13, secs. 1, 2, 3. And if such a devise be assailed by creditors as unjust or injurious to them, and in fraud of their rights, she will be allowed full satisfaction for her dower. Hall's Case, 1 Bland. 204, 205, and Gibson *v.* McCormick, 10 G. & J. 113. In such case the widow does not take by way of bounty, or as a donee or volunteer, but as a meritorious purchaser and contractor.
>
> "A general legacy to a widow, in lieu of dower, accepted by her, stands upon a different footing from other general legacies merely voluntary. It will be entitled in the payment of it, to a preference over such general legacies, even where the amount of the bequests exceeds the value of her dower; for in this matter, the testator is the only and best judge of the price at which he purchased it. 1 Rop. on Leg. 297, 298; Burridge *v.* Bradye, 1 P. Wms. 127; Blower *v.* Moret, 2 Ves. Sen. 420; Davinhill *v.* Fletcher, Amb. 244.
>
> "The widow, therefore, being not only a legatee,

but a favored purchaser for a fair consideration, whose legacy is not to abate in favor of other general legacies, simply voluntary, how does she stand in regard to a fund, to which a creditor of the testator can resort by virtue of a lien, but whose claim, as a debt against the deceased, she discharges?" [It was held that she was entitled to subrogation.]

The principle, that the comparative values of what is relinquished and gained by the wife make no difference in the application of the rule is declared by the Supreme Court of the United States.

Sykes *v.* Chadwick, 18 Wall. 141.

Frame of the Will.

The will of Col. Kenaday (1) was not written by any testamentary lawyer or with technical skill. It has an individuality arguing strongly that it was written by himself.

It begins with a declaration that he does not intend to die intestate, for he speaks of "directing how the *estates*" (evidently meaning all the property, real and personal), which it has pleased God to bless him with, shall be disposed of.

The testator then directs that all his just debts and funeral charges shall be paid out of his estate by his executrix, who is thereinafter declared to be his wife.

With evident anxiety to provide for her whom he declares to be "my beloved wife, Mary Louise Kenaday," he then proceeds with minuteness in that behalf, mingling together legally sufficient words of gift, with explanations, memoranda, and advice for her guidance, as each topic occurred to his mind.

Thus, he gives her "all my real estate," then inserts

abruptly "household furniture," then adds, "and claims pending in the courts in relation to said real estate, to wit," but this "to wit" is followed by an enumeration of the real estate itself, with a suggestion or limitation in regard to the way she can convey it. Then he inserts rather needlessly the word "Item," which, however, does no harm, since it means only "also" or "likewise," and is used conjunctively (Bouv. Law Dict., tit. "Item,") and goes on to describe the "claims pending in the courts" he has already bequeathed. The peculiarity of punctuation visible in the will, as in this clause, shows that the testator sometimes disjoined what he meant to be read conjunctively.

He then resumes with the word "Also," which by all the rules of law, grammar, and common sense applicable to wills or any other instruments, refers back to the governing verbs of this whole passage in the will, namely, "I give, devise, and bequeath to my beloved wife Mary Louise Kenaday." Any other interpretation, which would reduce what follows to a mere idle enumeration of property, without any disposition of it to any one, would be so strained, forced, and unnatural, and so opposed to the canons laid down by Jarman and all other writers, that it does not seem necessary to discuss it. The question is rather what passes to Mrs. Kenaday under this clause. The testator mentions the following:

> "My business as a claim agent and as publisher of 'The Vedette,' together with all books, papers, files, office furniture, &c., &c.
>
> "Also 200 shares of Sutro Tunnel stock and Comstock bonds.
>
> "Also notes and evidences of indebtedness to me *of more or less value.*
>
> "Also deposits of currency entered on my bank-

book of the National Metropolitan Bank, amounting to $10,000, *more or less.*"

The testator then makes a handsome legacy of $12,000 in United States bonds to his sister, Mrs. Sinnott (the leader in these attacks upon the widow and executrix), and it appears that these bonds were promptly delivered, with the accrued interest, in a few months after the testator's death (5).

He then provides for the surviving children of a deceased sister by legacies of moderate amounts, pointing out merely, as the executrix construed the provision, to which construction the legatees assented by their receipts, the fund from which they should be paid. These also were paid promptly (5). It may be observed that the testator mentions the residue of four per cent. bonds as $3,500, but bequeaths only $3,000.

It is "as clear as the noonday sun" that the foregoing was all the testator intended for said sister and children of a deceased sister, who resided at a distance from him.

The testator then gives directions to his executrix to pay a Mrs. Hemenway $500 in settlement of an account.

He then seems to recall that he has a City of Richmond bond on special deposit in the same bank with his 4 per cent. bonds, and he jots down in a merely *declaratory* clause that said bond "is hereby devised and bequeathed to my wife and executrix," which is perfectly true, regard being had to his bequest already made to her of "evidences of indebtedness."

Then, a sum advanced to one McGeorge, in California, "is hereby devoted to the relatives of my wife, and used according to her discretion."

The will, therefore, closes as it opens, with a reference to his wife, who is the object,—not of his "bounty," for

such a provision for a widow is not bounty, but the performance of a legal and moral obligation,—but of his loving solicitude, a solicitude which his collateral relations are now striving to defeat.

Distribution of the Estate.

At the death of testator the deposits in the National Metropolitan Bank, instead of $10,000, were found to be only $810.60. But to this amount the widow was certainly entitled as a legacy (2).

The United States bonds, instead of $15,500, amounted to $24,500 (7).

It has been suggested as a conjecture that the testator took over $9,000 from bank and invested it in $9,000 of these bonds. If so, it only tends to show all the more that the widow should not be deprived of these bonds on a technicality, unless the court were absolutely constrained to such a harsh result; and such is not the case.

On the contrary, the executrix and widow respectfully maintains that all the United States bonds, except those otherwise bequeathed, or used in paying debts and expenses, have vested in her under the general clause bequeathing to her "evidences of indebtedness to me, of more or less value."

If registered bonds of the United States, standing in the name of Alexander M. Kenaday (11) are not "evidences of indebtedness" to him, it seems difficult to say what would be considered such.

It does not appear that there were any other "evidences of indebtedness" for this clause to operate upon, and if the United States bonds be excluded from their scope, these words are rendered inoperative.

The rule in regard to the enumeration of things *ejusdem*

generis is also in favor of this construction, for the testator mentions in the clause immediately preceding this one, "Comstock *bonds*."

It was even argued in the court below that the first part of the will was an enumeration of articles *at the testator's office*. This evidently cannot be sustained. The list begins with the real estate and household furniture of the testator, then takes in claims in court, in the hands of his attorneys, and ends with currency deposited in bank. There is nothing whatever to show that the shares of Sutro Tunnel stock and Comstock bonds were at his office.

It was also suggested that because the Sutro Tunnel stock and Comstock bonds might be regarded as specific legacies, the "notes and evidences of indebtedness" ought also to be so regarded. But the distinction appears obvious. The Sutro stock and Comstock bonds are described by *name*—the others are not. The testator was also careful to give the most general and sweeping effect to the clause about evidences of indebtedness, by adding the words "of more or less value." Some significance should be given to these words.

Nor can it be said that this enumeration is orderly and logical. The testator jumbles together, in a sort of hotch-pot, real estate, household furniture, claims in court, good will of his business and, in fact, almost every class of property. If he did this in regard to property, it is not at all unlikely that he would mingle specific bequests and generic bequests in the same paragraph or part of his will, without regard to any technical rules of construction, of which he was indeed probably blissfully unconscious. As already said, therefore, it seems doubly hard to apply technical and rigorous rules of construction as against the wife whom he loved.

This bequest of "evidences of indebtedness" is of the most *generic* character, and not of any specific evidences or kind of "evidences," for none are named. Such generic bequests have been held repeatedly, in England and this country, to pass all the property of that *genus* owned by the testator *at his death*. Here there is nothing limiting the bequest to any specific articles. On the contrary, the indefinite words "of more or less value," like the words "more or less" which closely follow, aid the construction of the whole clause as being most general, as of an amount likely to vary from time to time, and intended to guard against any partial intestacy. The absence of any express mention of a "residue" in a will otherwise so carefully and minutely drawn, is thus explained. Having exhausted all *genera* of his personal estate, the testator foresaw that there would be no "residue." In other words, the will, in favor of the widow, speaks from the date of testator's death, and includes all the "evidences of indebtedness to me, of more or less value," that testator left at his death. It may be worth observing that all these United States bonds are registered in testator's name, and therefore all the more aptly described as evidences of indebtedness "to me."

One of the leading American cases on this subject is *Van Vechten* v. *Van Veghten*, 8 Paige (N. Y. Ch.) 104, 116. In that case the testator directed in his will that his son should be discharged from all notes which he held against him, and from all charges made against him by the testator for loans or advances, and all claims against him for the occupation or rents of certain premises specified. It was held that the son was entitled to a discharge from all such claims against him which existed *at*

the death of the testator, and not merely those which were in existence at the date of the will. Walworth, Ch., observed that this was in the nature of a personal legacy of the sums thus due, and went on to say (p. 116):

> "Although, as a general rule, it is well settled that a will of personal property relates to the time of the death of the testator, both as to the legatees and the subjects of the bequests mentioned in the will, yet in the case of specific legacies, it is sometimes very difficult to ascertain whether he intended to confine the bequests to the subject-matter thereof as it existed at the time of making the will, or as it might exist at the time when such will should take effect by his death. But to take the cause out of *the general rule, that in a will of personal estate, the testator is presumed to speak with reference to the time of his death*, there must be something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property, or subject of the bequest, as it existed at the time of the making of the will." [He cited Gilb. Eq. 87, and 2 Vern. 538, and disapproved Smallman *v.* Goolden, 1 Cox C. C., 329.]

The same principle is sustained in *Gold* v. *Judson*, 21 Conn. 622 (by Ellsworth, J.), and also in *Dalrymple* v. *Gamble*, 68 Md. 523, and in other cases perhaps even more strongly

Turpin *v.* Turpin, Wythe (Va.), 22.
Allen *v.* Harrison, 3 Call (Va.), 289.
Warner *v.* Swearingen, 6 Dana (Ky.), 195.
Means *v.* Evans, 4 Desau (S. Car.), 242.
Dennis *v.* Dennis, 5 Rich (S. Car.), 468.
O'Brien *v.* Edwards, 2 Edwards (N. Y.), 242.
Gilmer *v.* Gilmer, 42 Ala. 9.
2 Wms. on Executors, *885.

1 Jarman on Wills, 5th ed. *319, 326.
All Souls' College *v.* Coddrington, 1 P. Wms. 597.
Wilde *v.* Holtzmeyer, 5 Ves. 816.
Masters *v.* Masters, 1 P. Wms. 424.
Bridgman *v.* Dove, 3 Atk. 201.
Bland *v.* Lamb, 2 J. & W. 399.

In Banks *v.* Thornton, 11 Hare, 176, a bequest of "all the residue of my property which consists of stock" was held to include all stock in the testator's possession at his death.

The courts, in general, are averse from construing legacies to be specific; and the intention of the testator that they should be so, must be clear.

2 Williams on Executors, *741.
13 Am. and Eng. Enc. of Law, 15 (1st ed., tit. Legacies), and cases cited.

Any reasonable construction of a will, consistent with its terms, will be adopted by the courts in order to give it effect to dispose of the testator's *entire* property, instead of holding that he died intestate as to part.

Minkler v. *Simons*, 172 Ill. 323; 50 N. E. Reporter, 176.

It is not necessary that a clause of a will, in order to have the effect of a residuary clause, shall be the last clause, or that it shall contain any technical word such as "residue," and it may be followed, without impairing its effect, by a special bequest, which will be treated as an exception out of it, liable to fall back into it in case of lapse. To limit the effect of such a clause to *part* of the residue, very special words which clearly limit the gift, and show a clear intention to exclude such portion of the

property as fails to pass under other clauses of the will, must be used.

Morton v. *Woodbury*, 153 N. Y. 243; 47 N. E. Reporter, 283.

The learned Court of Appeals seems to have exhausted for the moment its powers of broad construction in enlarging the jurisdiction of the orphans' court, and applied a close and even narrow construction to the legacies to the widow.

By some process of reasoning, which does not seem to be quite fully stated, it reached the conclusion that the clause "also notes and evidences of indebtedness to me, of more or less value," is a *specific* legacy, though it does not say a legacy of *what*. Then, by further applying certain cases in which a definite amount, or a certain stock by name, or stock "now" on hand, is mentioned, it decides that this clause in this will did not speak as of the time of the testator's death, and could not embrace evidences of indebtedness acquired after the date of the will.

It is submitted that even if this strictness and narrowness of construction could be maintained in an otherwise evenly balanced case—as, for instance, between two legatees, or two collateral relations—it is erroneous to employ it where it produces partial intestacy, and also deprives the widow, who is "a purchaser for a fair consideration," of what she has *bought and paid for*.

The testator in this case is in the position of a vendor, and the will is like a bill of sale made by him. The words in it are to be taken most strongly against him, as the one *proferentem*.

A court ought not to be ingenious and astute in defeating the intention of a testator to die testate, and the rights of his widow, but rather the contrary.

AS TO WRIT OF ERROR OR APPEAL.

On this question the executrix craves leave to refer to her brief filed at the last term, at the time of the motion to dismiss or affirm.

As was said by this court in Campbell *v.* Porter (162 U. S. 478, 481):

> "The decision in *Ormsby* v. *Webb* (134 U. S. 47, 64, 65), has since been understood as governing the practice in the District, and evidently guided the course of the plaintiff in error in the present case. Under these circumstances, the question whether the form of bringing up a probate case shall be by writ of error or by appeal does not appear to us to be so important in its consequences that it should now be reconsidered."

The view taken by this court in the cases just mentioned is strengthened, if possible, by the act of June 8, 1898, c. 394 (30 Stat. 435), which provides:

> "SEC. 3. That *all* issues of fact hereafter arising in the Supreme Court of the District of Columbia holding a special term for orphans' court business, including those relating to the execution of the validity of any will or testament, shall hereafter be tried before said justice holding said special term, and that when required for such purpose jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at the special term of the Supreme Court of the District of Columbia sitting as a Circuit Court for said District."

This distinguishes the orphans' court more than ever from a court of equity and shows that it is a court of law.

Respectfully submitted.

WM. HENRY DENNIS,
Attorney for Plaintiff in Error and Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1899.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,
vs.
ARABELLA D. SINNOTT, et al.
} No. 305.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT AGAINST MOTION TO DISMISS OR AFFIRM.

This case results from the keen anxiety of some collateral relations to deprive a widow of part of the provision for her benefit, and to gain something which the testator never intended them to have.

Mr. Justice Hagner, a learned jurist of long experience in the testamentary law both of Maryland and the District of Columbia, who heard the case in the first instance, overruled all the exceptions to the final account of Mrs. Kenaday, the widow and executrix.

The Court of Appeals of the District of Columbia, on appeal by said collateral relations, likewise overruled their exceptions, with a severe censure of the spirit displayed in them, saving one exception, namely, that in regard to the

distribution of an alleged residue of the estate, consisting of United States bonds.

This difference of opinion on one point, between two learned Courts, in itself disposes of the charge that the executrix brings this case for review before the Court of last resort only for the purpose of "delay." As executrix, she is bound to sustain the manifest intention of the testator, so far as she can legally do so. As widow, she is meritoriously entitled to a consideration of her rights from the highest tribunal having jurisdiction.

Sykes v. *Chadwick*, *18 Wall.*, *141*.

The questions involved are of a substantial nature, and of general interest. They may be reduced to these points on behalf of the executrix:

1. That the Orphans' Court has *no jurisdiction* over an alleged residue of personalty in the hands of an executrix undisposed of by the will, that jurisdiction being peculiar to equity, as a matter of trust, in the absence of any statute to the contrary.

2. That the Court of Appeals erred greatly against the canons for the construction of wills, by holding a generic bequest to be specific, and by construing against instead of favorably to a widow who renounced her legal share, and so as to produce partial intestacy in a case at least doubtful.

Hardenberg v. *Ray*, *151 U. S.*, *112*.

I.

THE WRIT OF ERROR AND APPEAL.

As to the method of bringing the case to this Court, in the form both of a writ of error and an appeal, it was prompted, out of an abundance of caution, by the diligence and ingenuity shown by the parties on the other side and their counsel in seeking to escape from a hearing of the case here upon its merits.

The reasoning of the learned counsel, however, appears to proceed in a circle, that is to say, they argue that the appeal is void, because the case came here upon the writ of error, and the writ of error is void because the case ought to be brought here upon appeal!

If it be necessary to answer this mode of argument, it may be said that the writ of error was applied for and granted under the authority of *Campbell* v. *Porter*, 162 U. S., 478-489. That was a case upon the validity of a testamentary paper; but the Maryland Act of 1798, ch. 101, which is the law of the Orphans' Court in the District of Columbia, provides that *all* controversies in that Court shall be subject to a trial by jury upon an issue or issues, whenever either of the parties shall require it.

The Maryland Act of 1798, ch. 101, sub-ch. 15, provides as follows:

"16. Whenever either of the parties having a contest in the Orphans' Court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation) and if the party refuse to answer on oath (or affirmation, as the case may require) to any matter alleged in the bill or petition, and proper for the Court to decide upon, the said party may be attached, fined and committed, or his property may be attached and sequestered as aforesaid.

17. And on such plenary proceeding all the depositions shall be taken in writing, and recorded; and in case either party shall require, the Court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient, under all circumstances, for trying the same. * * *"

By the recent Act of Congress, approved June 8, 1898, all such issues shall be tried by a jury impaneled *in the Orphans' Court itself.*

It is difficult to see how a statutory court, such as the "Special Term for Orphans' Court business," could be regarded, in any sense, as a court of chancery or equity, from which it is carefully contradistinguished by the statute creating it. The fact that the questions in this case arose upon an account of the executrix does not appear to make this a suit in equity, any more than an action of "account" in a court of common law converts that court into a court of chancery. Nor is the Orphans' Court one of general jurisdiction, sitting at one time as a court of law and at another as court of chancery. But, in order to guard against any defeat of justice upon a mere technicality, and not finding an exactly similar case as authority, the Court of Appeals, D. C., very considerately allowed an appeal as an alternative to the writ of error. This was certainly in aid of substantial justice, and involved no hardship or deprivation of rights to any of the parties, but rather the contrary.

It does not appear ingenuous, in the brief in support of the pending motion (p. 8), to argue that the Court of Appeals considered an appeal to be the proper method in this case, because it came to that Court by appeal. As is very well known, *all* cases, including judgments at law, must be taken to the Court of Appeals, by appeal, under the statute creating that Court.

II.

THE QUESTION OF THE FORMER APPEAL.

As to the arguments in support of the motion, to the effect that this case should have been brought to this Court immediately after the decision on the former appeal therein (14 App. Cas., D. C., 1) it seems sufficient to say that this Court would have dismissed it in the same manner and for the same reasons as the case of *Gilbert* v. *Beneficial Endowment Association*, at October Term, 1898, which was a case remanded by the Court of Appeals, D. C., for the

stating of a further account by the auditing officer of the Court below.

This, by the way, was the first and only appeal by the *executrix*. Two former appeals were taken by the next of kin.

It is submitted that it is obvious from the record that very important discretionary duties were left to the Orphans' Court by the mandate of the Court of Appeals (Record, p. 14.) In directing a distribution of an alleged residue to the "next of kin," the Court of Appeals did not undertake to decide who were the next of kin, or in what proportions they should take, or other essential questions, such as that in reference to the alleged death of one of them (Record, pp. 15 and 16.) The account was entirely recast under the mandate (pp. 7–17).

The authorities cited in support of the motion, to the effect that a second appeal will not lie when the action of the lower court is in accordance with the mandate on the first appeal, apply in cases where the court, whose mandate is thus obeyed, is the court of *last resort* in that case. In this case, the Court of Appeals is an intermediate court; and the Supreme Court of the United States, of course, will only entertain cases where the action of the Court below is final, and leaves only ministerial and not judicial action to be taken by the Court or Courts below.

Lodge v. *Twell*, *135 U. S.*, *232*.
McGurkey v. *Toledo, etc., Ry. Co.*, *146 U. S.*, *536*.

While it is true that the original decision of the Orphans' Court, if affirmed in all respects, would have been final as to the next of kin, it does not follow that its reversal was a "final" decision. A judgment at law in favor of the defendant is final against the plaintiff; but if it is reversed in the Court above that is not a "final" and appealable decision. It only gives the plaintiff the right to a new trial,

after which there may be a further appeal, according to circumstances.

Complaint is made (p. 5) that the opinion of the Court of Appeals on the former appeal is not included in the transcript of record in this case. The answer is that it was part of *another case* in the Court of Appeals, and therefore could not be included or certified in this case. Even if this were not so, the defendants in error or appellees had their remedy by certiorari, to require it to be sent up. The executrix always intended to print it as an appendix to the brief in her behalf, for the convenience of this Court, and it is now printed as an appendix to this brief.

It is respectfully submitted that, so far from its being shown that this case should be summarily dismissed or affirmed, it appears that it is deserving of full argument and consideration when it is reached in its regular order.

WM. HENRY DENNIS,

Attorney for Plaintiff in Error and Appellant.

Court of Appeals of the District of Columbia.

ARABELLA D. SINNOTT ET AL., APPELLANTS,

v.

MARY LOUISE KENADAY, EXECUTRIX.

WILLS; UNDISPOSED OF RESIDUE; DISTRIBUTION; ORPHANS' COURT; EXECUTOR'S COMMISSIONS; ALLOWANCES FOR BURIAL EXPENSES.

1. Where a testator bequeaths to his wife, who is named as executrix, a particular class of claims, and also his business as a claim agent, and as publisher of a periodical, with all books, papers, files, etc.; also 200 shares of certain stocks, also notes and other evidences of indebtedness "of more or less value," and deposits of currency entered on his bank book at a certain bank, the bequests are specific, and will not include U. S. registered bonds acquired after the date of the will, or lapsed legacies, or other personal estate of which the testator died possessed.
2. In such case, where the will has no residuary clause, the undisposed of residue devolves upon the executrix, who however takes no beneficial interest therein, but the same is distributable to the next of kin of the testator.
3. Under the Act of Maryland of 1798, Ch. 101, the Supreme Court of the District, holding a special term for Orphans' Court business, has power and jurisdiction to make and enforce distribution of such undisposed of residue of the personal estate of the testator.
4. That the will makes a specific bequest of certain bonds to "my wife and executrix," will not deprive her of commissions where there is nothing to indicate that it was given by way of compensation as executrix and in lieu of commission.
5. An allowance by the Orphans' Court of commissions to an executrix, within the limits prescribed by the Act of Maryland of 1798, is conclusive, and not subject to review in an appellate court.
6. An allowance to an executrix of credit in her account for expenses incurred in the purchase of a lot in a cemetery and the erection of a monument thereon, is proper, when there has been no extravagance n such expenditure, and the rights of creditors and even of legatees are not prejudiced.
7. Legatees who have assented to a sale by the executrix of certain bonds bequeathed to them and who have received the proceeds of sale and receipted therefor, can not thereafter object to the sale.

No. 855. Decided January 3, 1899.

APPEAL from order of Supreme Court of the District of Columbia holding a special term for Orphans' Court business (Probate No 7744), approving and passing a final account settled by an executrix. *Reversed.*

Mr. F. P. B. Sands and *Mr. W. A. Milliken* for the appellants.

Mr. Wm. H. Dennis for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is taken by the sister, and the children of a deceased sister, as the next of kin of the late Alexander M. Kenaday, deceased, from an order of the court below, approving and passing what would appear to be a final account settled by the executrix of the deceased. And the questions presented on the appeal, as stated in the assignment of errors, have relation to the construction of the last will and testament of the deceased: the power and jurisdiction of the special term of the Supreme Court of this District, sitting to transact Orphans' Court business, to make and enforce distribution of the residue or surplus of the personal estate of the deceased, not specifically or expressly disposed of by his will; and also as to the right of the executrix to be allowed certain sums claimed as credits in her account, against the exceptions of the appellants

The deceased, Alexander M. Kenaday, died in this city of Washington, on March 25, 1897, leaving a last will and testament bearing date the 3d of April, 1894, and by which his widow, Mary Louise Kenaday, was made sole executrix, and which will was duly proved and admitted to probate, and letters testamentary were granted to the executrix named. The deceased left no child or descendant; but he left one sister surviving, and several children of a deceased sister, who predeceased the testator. The surviving sister and some of the children of the deceased sister are the appellants in this appeal, and the widow, the sole executrix, is the appellee.

The case has been in this court on a former appeal (Sinnott vs. Kenaday, 12 App. D. C. 115: 26 Wash. Law Rep. 121); but the specific questions now presented were not then decided by this court. We did, however, say, that the court below would have the power and jurisdiction to grant relief of the nature then prayed, upon a petition filed at the proper time. The petition in that case had been prematurely filed. There had been, at that time, no final or other account, in the nature of a full account, stated by the executrix and approved by the court, showing the true condition of the estate. The final, or what is substantially a full account, has now been stated, and distribution thereon made. The appellants excepted to the account and distribution, but the exceptions were overruled, and the account and distribution were ap-

proved and passed by order of the court of Oct. 11, 1898. It is from that order that this appeal is taken.

By the will of the testator, all his real estate, of considerable quantity and value was devised to his wife, and also a considerable portion of his personal estate. He specifies by general designation a particular class of claims bequeathed to his wife; and he then bequeaths to her his business as a claim agent, and as publisher of "The Vedette," together with all books, papers, files, furniture, etc., etc., also 200 shares of the Sutro Tunnel stock and Comstock bonds; also notes and evidences of indebtedness to him, "of more or less value;" also deposits of currency entered on his bank book of the National Metropolitan Bank amounting to $10,000, more or less.

He then gives to his sister, Mrs. Sinnott, of New Orleans (the sister who survives him), $12,000 in registered U. S. 4 per cent bonds, on special deposit in the National Metropolitan Bank.

Then follow gifts to the children of Mrs. Piles, his deceased sister, "out of the *residue* of 4 per cent. bonds deposited as aforesaid $3,500 as follows:"—naming the legatees, and the amounts given to each, though the several amounts added only make $3,000, and not $3,500—thus leaving of the residue of $3,500 U. S. Bonds on deposit in bank, $500 undisposed of. It is alleged by the appellants that of these amounts thus given to the children of Mrs. Piles, the legacy of $500 given to Eloise Piles, and the legacy of $250 given to Henry C. Piles, have both lapsed by the death of the legatees in the lifetime of the testator.

By another clause of the will there is a promissory note for $1,100.00, secured by a chattel mortgage, made by Mrs. Hemenway, which he directed to be canceled, and that his executrix might allow Mrs. Hemenway $500 in settlement of her account. And then in what appears to be a separate clause of the will he declares that "the bond of the city of Richmond for $5,000 bearing 5 per cent. interest, payable January and July (on special deposit with the 4 per cent. bonds of the United States in the National Metropolitan Bank) is hereby devised and bequeathed to my wife and executrix."

There are some other special provisions in the will, but nothing in addition to what we have recited that is at all material to the questions raised on this appeal *There is no residuary clause in the will.*

It appears by a certificate from the United States Treasury Department, that about a year after the date of the will, that is, on the 1st of April, 1895, the testator acquired and left

standing in his name and to his credit, in the Treasury of the United States, additional $9.000 United States registered 4 per cent. bonds, and thus making the sum total of United States bonds held to his credit at the time of his death amount to $24.500. And in the absence of a residuary clause or bequest in the will, the principal question here is, to whom should these after-acquired bonds, and the $500 of the residue of the $15.500 bonds on special deposit in the bank, and the two lapsed legacies, or such residue thereof after payment of debts, and all other legitimate claims and charges to which they are subject, be distributed?

The will is certainly very unskillfully drawn, but we think there is no great difficulty, by the application of the ordinary principles of construction, in getting at the intention of the testator, and the legal effect of the instrument.

In this final, or what appears to be the full account stated by the the executrix, she charged herself with the amount of the inventory, and with the increased value or increment of the bonds belonging to the estate, the total amount of the inventory being the sum of $36,454 85. Upon this amount she asked and was allowed a commission of ten per cent., making the sum of $3.645.48. This allowance of commission is excepted to by the appellants as being improper, or as excessive, under the facts of the case.

The executrix claimed and was allowed credit for $268.50 paid to the undertaker as funeral expenses; and she also claimed and was allowed as credits in her account the sum of $317 paid for a burial lot in Rock Creek Cemetery and the sum of $575 paid for a monument placed over the grave of the deceased. These two latter sums are excepted to by the appellants as not being legally chargeable to the estate.

In making the distribution of the surplus or residue of the personal estate, after deductions of all claims and allowances and for debts paid, and for all legacies paid over or retained, the executrix took credit in her account, and in discharge of the inventory, for the household furniture, and the City of Richmond bond for $5,000; and she then makes distribution to herself of the balance, or remaining surplus of the estate, in this form: "on account of the bequest to her by the testator of 'notes and evidences of indebtedness to me;' 'deposits of currency entered on my bank book,' and other personal estate, the residue consisting mainly of United States bonds and deposits in bank, $9.218.76." This distribution is excepted to by the appellants, as being without right or warrant in law.

There is also an objection made by the appellants to a sale

made by the executrix of $1,500 of the United States bonds, the proceeds of which sale, it appears, were paid over to the Piles legatees, and for which they gave their receipts to the executrix.

1. We shall first examine the question as to what right and nature of interest was taken by the widow and executrix of the testator, under the will; as upon the determination of that question the other questions raised by the exceptions to the account may, to a certain extent, depend.

There can be no question but that the bequest of the particular claims mentioned and described by the testator as then depending in the courts, were specific legacies, and would have been adeemed if they had been collected in the lifetime of the testator. And so the bequests in the succeeding clause of the will whereby the testator gave to his wife "200 shares of Sutro stock and Comstock bonds; also notes and evidences of indebtedness to me, of more or less value; also deposits of currency entered in my bank book of the National Metropolitan Bank, amounting to $10,000, more or less," are of the same character as the claims bequeathed. It is very clear that this bequest did not embrace United States registered bonds. In all these bequests specific things or matters are referred to as the objects of the bequests; and if they had been disposed of or extinguished by the testator in his lifetime, the legacies would have ceased to exist as such. It has been held in repeated decisions, that a bequest of 100/ consols now standing in my name at the Bank of England (Roper on Leg., ch. 3), or of 100/ consols, *part* of my stock; (Kirby v. Potter, 4 Ves. 750; Hays v. Hays, 1 Keen, 97; Shuttleworth v. Greaves, 4 M. & Cr. 35; are specific bequests. And while a legacy is general when it is so given as not to amount to a bequest of a particular thing yet a legacy is specific when it is a bequest of a specific part of the testator's personal estate, which is and can be distinguished from the rest of his personal estate. Therefore, a bequest of money to be received under a judgment or decree of court, is a specific bequest, and, consequently, not liable to abate with general legacies; and as a result of this principle, if the fund out of which such bequest is payable fails, or should for any cause prove to be insufficient to fulfil the bequest, the legatee must suffer the loss. Chase v. Lockerman, 11 Gill and Johnson, 186. If, therefore, a thing or subject matter be bequeathed in a will by such description as to distinguish it from all other things disposed of by the will, so that it does not remain at the death of the testator as property embraced in any other bequest made by the will, it is a specific legacy,

as distinguished from a general legacy; and the legatee is entitled to the very thing bequeathed if it be possible for the executor to deliver it to him, with all interest or devidends received: but if it can not be delivered, he can have no claim for compensation in money in lieu of the specific thing bequeathed by the will. But, as a distinguishing quality of a specific legacy, and one that gives it preference over other legacies, it must be paid or retained by the executor, while general legacies may be applied to the payment of debts of the estate of the deceased. Specific legacies must be paid or retained by the executor in preference to those which are general, and must not be sold or otherwise applied for the payment of debts or other charges against the estate until the general assets of the testator's estate are exhausted. But while it enjoys this quality of preference or exemption, it is liable to be adeemed by the act of the testator in his lifetime; and this liability to ademption is a fair test of the character of the legacy itself.

According to the principles just stated, all the legacies, including those given to the wife, except the pecuniary legacy of $500, directed to be allowed to Mrs. Hemenway, are specific legacies: and therefore such legacies do not, of course, embrace the after-acquired United States bonds, or lapsed legacies, or any other personal estate or funds of which the testator died possessed: but such estate or funds mak up the residue of the estate, which is subject to be applied to the payment of debts, legacies and charges all kinds, and expenses of administration, to which the estate is liable, to the exoneration of the specific legacies.

But though there is no residuary clause in the will, and the specific legacies do not embrace or exhaust the entire personal estate, the testator did not die intestate as to this residue or surplus, remaining after payment of debts, and any legacy not otherwise provided for, and all the charges and expenses to which the estate was liable. Such surplus or residue devolved on his executrix. And the next question is, what interest did she take in it, if any, other than that of mere executrix for purposes of administration, and how and where is she to account for and distribute this undisposed-of surplus or residue?

It is contended on behalf of the widow and executrix, that this surplus or residue, undisposed of by any express provision of the will, is by law vested in her as executrix: and that the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, under the testamentary act of 1798, Ch. 101, has no jurisdiction or

power over the subject of this undisposed-of residue; and if distribution thereof is to be made, it can only be made and enforced by a court of equity, in the exercise of its jurisdiction in respect to implied or constructive tests. But to this contention we cannot for a moment yield our assent.

It is true, according to the English testamentary system, *at law*, it had been the rule from the earliest period, that the whole personal estate devolved on the executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there should be any surplus, it would vest in the executor *beneficially*. In equity, however, while the rule was, *prima facie*, the same as at law, yet, it was held in many cases, that the general rule *at law* should be controlled *in equity*, in all cases where a necessary implication or strong presumption arose that the testator meant to give *only* the office of executor, and not the beneficial interest in the residue. 2 Wms. Executors, 1263, 1264, where the cases are compiled. This rule remained unchanged in England until the year 1830. In all such cases, the executor was considered as a trustee for the next of kin of the testator, the trust to be declared and enforced by a court of equity; the theory being that the English ecclesiastical courts had no jurisdiction over such trusts, or, as said in one of the cases, "but a lame jurisdiction." Pamplin v. Green, 2 Cha. Cas. 95; Matthews v. Newby, 1 Vern. 133, 134. And in stating the origin and growth of the jurisdiction in equity, in ingrafting a trust upon the legal estate devolved upon the executor, Lord Chancellor Hardwicke, in Southcot v. Watson, 3 Atk. 227, 228 (in 1745), said that, "ever since the case of Foster v. Munt, 1 Vern. 473, before Lord Chancellor Jefferies, (in 1687) which underwent various fates, the doctrine established in this court has been that where a man makes a will and an executor, *and gives him a legacy*, he to be considered as a trustee merely for the rest of kin, upon an equity founded on the statute of distribution." This doctrine of a court of equity, in raising a trust in favor of the next of kin, was introduced in order to overcome what was regarded as an unjust and inequitable result of allowing the executor to take the beneficial interest in the residue to the exclusion of the next of kin. In some of the early cases it was held that where the wife of the testator was made executrix, and there was a surplus or residue undisposed of, she would take beneficially, upon consideration alone of being wife. This was so held in the case of Ball v. Smith, 2 Vern. 675; and in the leading case of Farrington v. Knightly, 1 P. Wms. 544, 549, before Lord Chancellor Macclesfield. The chancellor, in stating his first impressions of that case, said: "An

executor, from his name, is but a trustee, he being to execute his testator's will, and therefore called an executor. In the present case, the testator is not to be looked upon as dying intestate, but to have made the executor a trustee of the surplus; and this is the reason why the spiritual courts can not compel a distribution, *because they can not enforce the execution of a trust.* Indeed, in the case of a wife, it has been held that where she is executrix *and has a legacy*, and there is no disposition of the surplus, she shall have it; but I do not hear any precedents cited that go further." This was said by the chancellor in giving his first impressions of the case; but, upon further examination and consideration, he held, and produced several precedents to show, that the wife being the executrix made no difference, and that where she *took a legacy under the will*, she should be decreed to make distribution of the surplus among the next of kin. 1 P. Wms. 550, and the cases cited, and the note to that case by Mr. Cox. And in speaking of the reason of the rule, the chancellor said: "That as to the reason of the case, it was most plain, the making of the person executor ought not amount to a gift of the testator's personal estate; it was no more than making him a trustee, the very word executor importing, *ex vi termini*, that he was only appointed to execute the will, and to have nothing but the management of the personal estate."

The question of the right of executors to appropriate to themselves the undisposed-of surplus or residue of the personal estate of their testators gave rise to much perplexing and expensive litigation, and the state of the law upon the subject became very unsatisfactory, and was frequently the subject of severe animadversion by the equity judges. See cases of Urquhart v. King, 7 Ves. 225, and Pratt v. Sladden, 14 Ves. 193, 197. And to correct what was conceded to be an unjust and unsatisfactory state of the law upon this subject in England, the statute of 11 Geo. 4 and 1 Wm. 4, was passed. By that statute it was declared that any person appointed an executor shall be deemed by the courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the statute of distributions, in *respect of any residue not expressly disposed of*, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially.

The principle that obtained in the English law prior to the passage of the statute just referred to, never had force or recognition in the jurisprudence of Maryland, and consequently, it never had force or recognition as any part of the law of this District. Indeed, we think we are justified in stating that

such principle never formed part of the American law, and hence Mr. Justice Story was well warranted in laying it down as clear that "in America the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator." 2 Sto. Eq. Jur. Sec. 1208.

The executor, as is well understood, derives his title as executor from the will of the testator, but he takes no beneficial interest in the undisposed-of surplus or residue of the personal estate, by mere implication or construction, as by the former English Rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect to the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the Orphans' Courts of Maryland, and the special term of the Supreme Court of this District for Orphans' Court business, by the testamentary act of 1798, ch. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself. It is by no means limited and restricted in the general scope of jurisdiction conferred on the Orphans' Court, to the limited powers and jurisdiction of the spiritual courts of England, as formerly exercised, in respect to testamentary matters. The title of the act plainly indicates its general scope and policy. The title is "An act for amending and reducing into one system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons." In an act so comprehensive as that of 1798, intended to embrace the whole law of administration of decedent's estates, if it had been the intention of the legislature to exclude the jurisdiction of the Orphans' Court in respect to the surplus or residue of the personal estate of the deceased, undisposed of by his will, and to confide that jurisdiction exclusively to a court of equity, and thus, in such case, to divide the administration between two tribunals, we should certainly find some provision in the statute relating to such an exception from the jurisdiction of the Orphans' Court. But nothing of the kind appears in the act. The

only provision to be found in the act that has reference to the right or interest of the executor in the residuary estate of the deceased, is found in Sec. 6, Sub. Chap. 9. By that section, if the executor be a *residuary legatee*, he may be excused from returning to the court an inventory or account, upon giving bond for the payment of all debts and claims against the estate, and for the payment of all legacies given by the will. But it is very plain that this provision contemplates the case of an express residuary bequest to the executor, and not a right to such residue or surplus undisposed of, arising alone by implication or construction of law.

An inference is sought to be drawn, and as showing that the Orphans' Court was not intended to take cognizance and make distribution of such residue or surplus, from the fact that in the Subch. 11, and the sections of that subchapter, providing for the distribution of an intestate's estate, the word "executor" does not appear. But that fact can furnish no material inference in support of the contention of the appellee. There is no lack of provision in the act conferring power and jurisdiction upon the Orphans' Court to make and enforce distribution of the residue of a testator's estate which has not, by any express terms of his will, been disposed of: the power and jurisdiction of that court being ample to superintend and direct full and complete administration of as well the estates of testators as those of intestates. By Sec. 21 of Subch. 15, the Orphans' Court is instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration: *directing the conduct and settling the accounts of executors* and administrators, securing the rights of legatees, superintending the the distribution of the estates of intestates, securing the rights of orphans and legatees, and *administering justice in all matters relative to the affairs of deceased persons according to law.*" And further, by Sections 6 and 10 of Subch. 10, relating to the duties of executors and administrators, it is, by the first of these sections, provided, that it shall be the duty of an executor, upon the settlement of his account showing that all debts and claims are paid, to deliver up the estate in his hands to those entitled to receive it; and by the next of these sections, it is made the duty of an administrator, upon the settlement of his account, showing the debts and claims all to be paid, to deliver up and distribute the surplus or residue of the estate as therein directed. And by Section 12, of Subch. 15, among other things, it is provided, that "The Orphans' Court shall have full power, authority, and jurisdiction, to examine, hear and decree upon,

all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

These provisions of the statute are certainly ample to confer authority and jurisdiction upon the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, to direct and enforce the distribution of the undisposed-of residue of the personal estate of the testator, in this case; and we are clearly of opinion, that the executrix, the widow of the deceased, did not take, by any construction of the will, any beneficial right or estate in such undisposed-of residue, as distinguished from her title merely as executrix; and that such undisposed-of residue must be distributed to the next of kin of the testator.

2. The next question is that raised by the exception to the allowance of the commission to the executrix.

It is objected in the first place, that no allowance of commission should have been made, because the specific bequest of the City of Richmond bond, for $5,000, was bequeathed by way of compensation for all trouble and services to be rendered by the executrix in the administration of the estate; and in the second place, if such specific bequest was not intended as such compensation to the executrix, the rate of commission allowed was excessive and unreasonable.

We are of opinion that neither of these objections can prevail. The bequest of the Richmond bond was to "my wife and executrix," without other designation, but nothing to indicate that it was given by way of compensation, and to be taken in lieu of commissions. The descriptive words used to designate the legatee were entirely natural and proper, and were clearly intended as mere *descriptio personæ* of the legatee; and if the wife had failed to obtain letters testamentary, she would, doubtless, have taken the legacy, notwithstanding her failure to become executrix by qualification. This legacy, therefore, can not be treated as compensation in the place and stead of the commission allowed by law. The terms of the bequest will not bear any such construction.

Nor can the objection that the rate of commission is excessive and unreasonable be available to the appellants on this appeal. The statute, by its terms, declares that the commission to be allowed to the executor or administrator shall be, *at the discretion of the court*, not under five per cent. nor exceeding ten per cent. on the amount of the inventory

or inventories, excluding what is lost or hath perished." Act 1798, Ch. 101, Subch. 10, Sec. 2. This provision of the statute, having fixed a minimum and maximum rate of commission to be allowed to executors and administrators, and vested a discretion in the Orphans' Court, restricted only by those limits, an allowance by that court, or court exercising its powers and jurisdiction, within those limits, is conclusive, and therefore not the subject of review in an appellate court. This has been uniformly held by the Court of Appeals of Maryland, in cases where this question on this statute has arisen. Wilson v. Wilson, 3 G. & J. 20; Gwynn v. Dorsey, 4 G. & J. 453; McPherson v. Israel, 5 G. & J. 60; Thomas v. Frederick Co. School, 9 G. & J. 115. The court below was therefore clearly right in overruling the exception to the commission allowed the executrix.

3. Then, as to exceptions to the allowances for the price paid for cemetery lot in Rock Creek Cemetery, at this city, and the price paid for monument placed over the grave of the deceased. The statute provides for the allowance for funeral expenses of the deceased, at the discretion of the court, not to exceed $300. In this case $268.50, were paid the undertaker as funeral expenses. The allowance made of $317 for lot in cemetery, and $575 for monument placed on the lot, are charged and allowed as distinct claims for expenditure incurred for the interment of the deceased. If this were the case where creditors were prejudiced by the allowance of these expenditures, or even legatees whose legacies were lessened by the allowance, the exceptions might receive different consideration.

But this is not such case. The case here is one where the deceased has left a considerable estate, but no children or descendants; and his estate goes to his surviving wife and certain collateral relations. He occupied in life a respectable position in society, and was entitled at his death to such funeral obsequies and respectable interment as accorded with his position and circumstances in life. He was entitled to be buried in the cemetery, and to have his grave marked and distinguished with such monument as is customary with persons of his position and estate. To inter his body in a cemetery, the usual place of interment, it was necessary that a lot should have been purchased, and improved, and distinguished by a suitable monument, to make it conform to its environment, at least to a certain degree. The expenses incurred for these purposes were not strictly funeral expenses; certainly not within the sense and meaning of the provision of the statute, which limits funeral expenses to an amount not to

exceed three hundred dollars. It does not appear that there was any extravagance in the expenditure for these objects, and we can not say that there was error in allowing credits for the amounts claimed in respect to them by the executrix. It would seem to be an ungracious act, on the part of the exceptthe relatives and recipients of the bounty of the deceased, to ants, deny and object to the right of the widow and executrix of the testator, to place over the grave of the latter a lasting memorial structure, at the expense of his own estate, simply because it may lessen to a small extent the amount of distribution that they would otherwise receive. If it were shown that such expenditure was extravagant, and for inappropriate objects, quite another question would be presented; but there is nothing to show any such state of case.

4. And lastly, with respect to the exception to the sale by the executrix of the $1,500 United States bonds, we think there is nothing in the case to support the exception. If the bonds had been of denominations capable of specific delivery, and the legatees had desired such delivery, it would have been the duty of the executrix to have delivered the bonds. But it appears the legatees were content to have the bonds sold and to receive the money therefor, and they did receive the money and receipted to the executrix for it. They can not now be heard to urge an objection to the sale.

It follows from what we have said, that the order of the court below, of the 11th of October, 1898, approving and passing the account of the executrix, must be reversed, and the cause be remanded, that the account be re-stated in accordance with the principles of the foregoing opinion; and it is so ordered.

Order reversed and cause remanded.